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CHARLES ELM

No. [redacted] 48

In The

Supreme Court of the United States

IN RE: TENNESSEE PUBLISHING CO., Debtor

Petition for Certiorari

TENNESSEE PUBLISHING COMPANY, Debtor
Petitioner

AMERICAN NATIONAL BANK
C. O. CARPENTER, RECEIVER, ETC.
J. C. BRADFORD AND O. H. INGRAM
R. H. M. ROBINSON AND C. T. JAFFRO,
RECEIVERS, ETC.
COMMERCE UNION BANK
BROADWAY NATIONAL BANK
ET AL

Appellees

LEWIS S. POPE,
WHITE & HOWARD,
ROBERTS & ROBERTS,
Nashville, Tenn.

Attorneys for Petitioner-Appellant

PITTS, McCONNICO, HATCHER & WALLER,
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Attorneys for Appellees.

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Attorneys for Appellees.

TO THE HONORABLE CHARLES E. HUGHES, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION OF TENNESSEE PUBLISHING COMPANY FOR THE WRIT OF CERTIORARI

Your petitioner, Tennessee Publishing Company, a Tennessee corporation, respectfully shows to the Court as follows:

-I-

That this Court has jurisdiction to hear and determine the questions raised in this petition, as hereinafter set forth under Section 347, (Judicial Code, Section 240, amended).

-II-

The date of the decree in the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, is February 13, 1936.

-III-

Said Circuit Court of Appeals modified and affirmed the judgment of the District Court of the United States for the Middle District of Tennessee, Nashville Division.

-IV-

STATEMENT OF THE CASE

Tennessee Publishing Company, a Tennessee corporation, publishing a morning and an evening edition of a daily newspaper at Nashville, Tennessee, filed its petition for reorganization under Section 77-B of the Bankruptcy Act, on June 6, 1935, in the United States District Court at Nashville, Tennessee. Said corporation had issued its first mortgage bonds

secured by deed of trust, on a large part of its machinery, equipment and certain other of its assets used in the publication of its newspapers, dated November 1, 1928, in the principal sum of $750,000.00. It was also indebted to various creditors by unsecured claims amounting to about $300,000.00. At the time of the filing of this petition for reorganization the corporation was in the hands of a receiver of said District Court appointed in the case of C. O. Carpenter, Receiver, Etc. v. Tennessee Publishing Company, et al, under a bill filed in March 1933, said Carpenter being receiver of a closed National Bank holding an unsecured claim against debtor and also holding its first mortgage bonds amounting to $28,000.00. At the time of the filing of said bill in March 1933, for the appointment of a receiver to conserve the assets of said corporation, its business was being neglected and its assets were being dissipated, under circumstances set out in said equity proceedings. However, interest had been paid on all its outstanding bonds and all said bonds had many years to run before maturity, and were in no wise in default.

After the receivership, by reason of increased expenditures in the operation of the papers, or otherwise, there was default in the payment of interest on the bonds. No foreclosure under the trust deed to secure the bonds was sought in the receivership bill. These facts appeared in the petition for reorganization, together with other necessary facts, and that debtor was unable to meet its debts as they matured, and that it sought and required relief under Section 77-B of the Bankruptcy Act. It is further set out in the petition for reorganization that the corporation's assets are in the hands of a receiver, that they are of substantial value, and that its assets when administered as a going concern, together with its good will, have an earning power and value which should be preserved by proceedings for reorganization under Section 77-B of the Bankruptcy Act; that such reorganization would be for the benefit of its creditors and all interested parties, whereas, if said assets are liquidated their value would be greatly diminished, that this is particularly true in this case because of the nature of the newspaper business. It further appears in the petition that an application had been made in the equity cause for a sale of the assets and property of debtor, under the equity bill in receivership, although no order for sale had been made in said cause. The District Court entered an order on June 6, 1935, reciting that the Court being satisfied that the petition complied with Section 77-B of the Bankruptcy Act and had been filed in good faith, it was ordered that the petition be approved as properly filed under

Section 77-B of the Bankruptcy Act. It was also ordered that the receiver in the equity cause be directed to retain possession of the business and affairs of petitioner subject to the further orders of the Court. A rule was then made on all parties to said receivership cause, and on all creditors and stockholders in debtor corporation, to appear and show cause, if any, as to whether or not the petition for reorganization should be dismissed.

Petitioner filed its first plan of reorganization on July 13, 1935, and later filed amended plans of reorganization. Some of the bondholders and some of the unsecured creditors protested against the approval of the plans of reorganization by pleadings duly filed in the case, and sought to have the petition, as amended, and the plans of reorganization dismissed. Various pleadings were filed in the District Court and numerous orders were made therein, when, on October 25, 1935, the District Court entered a final order reciting that "The Court is of the opinion that said petition and plans presented therein and thereby should be dismissed, except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinion of the Court, which are filed in this cause and ordered to be made a part of the record," etc. The District Judge stated in his opinion that "I find as a fact that it (the petition for reorganization) was filed in good faith." However, the District Judge held that the bondholders have certain specific rights under their deed of trust of November 1, 1928, and that although the question as to whether or not Section 77-B is valid and constitutional had not been passed upon by this Court, he held that under the case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, if the property covered by the trust deed is sold in any other way than as therein provided, or if the value of the property, or the value of the securities should be determined by appraisal, or in any way not agreeable to two-thirds or more of the bondholders, and contrary to the way provided for in the deed of trust, it would deprive the bondholders of substantive rights in the property as guaranteed to them by the Fifth Amendment to the Federal Constitution, and that since two-thirds of the bondholders had not approved the plan of reorganization the Court was powerless to compel them to accept any of the plans proposed for the reason that the bondholders would thus be deprived of their constitutional rights to a public sale of the property under the authority of the Radford case. For this reason, the petition for reorganization and the plans submitted by debtor were dismissed.

American Appraisal Company, an outstanding expert of

national reputation, was appointed by the Court to appraise the properties of debtor, both those covered by the trust deed and those not so covered. The report of the Appraiser showed that the property covered by the trust deed had a value of less than $300,000.00, and that the property not so covered was of considerably less value. The amount due, both principal and interest, on the outstanding bonds is about $900,000.00.

The original complainant in the equity cause, C. O. Carpenter, Receiver, etc., in his answer to the petition for reorganization alleged that "the total salable value of all the property of the defendant will not exceed $300,000.00." Paul M. Davis, who claims to have acquired $250,000.00, par value, of said bonds, long after the petition for reorganization was filed, he being also President of American National Bank, the claimed owner of $210,000.00, principal, of said bonds, filed his offer of purchase, immediately preceding the date of the final order of Judge Gore in October 1935, proposing to pay $400,000.00 for the property covered by the trust deed, on certain conditions stated in the proposition, and $40,000.00 for all the other assets of debtor.

The plan of reorganization filed by debtor on July 13, 1935, and amended thereafter, on October 15, 1935, submitted the following:

"The debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation as the same may be judicially determined by this Court, or the appraised actual cash value of all valid interests, claims or liens on any of debtor's property when judicially determined. Said payment to be made into Court or under such other arrangement as the Court may direct."

After the trial Court had indicated its opinion that the bondholders were entitled to a judicial sale unless two-thirds approved the plan, on October 23, 1935, debtor proposed a third alternative plan of reorganization, to the effect that it would take over the operation of its affairs, subject to all legal liens to the full amount that the Court determines to be due the holders thereof. That if the holders of the securities under the trust deed are willing to accept eighty cents on the dollar of the face value of the bonds so held by them, which would amount to $600,000.00, that the debtor would accept said amount as due and retain its property subject to the mortgage for that amount. And in the event that some

of the bondholders are willing to accept eighty cents on the dollar and others are unwilling to do so, debtor proposes to fix the amount due those willing to accept eighty cents on the dollar as the amount due them, the present deed of trust standing to secure them, and to have the Court determine the amount due other holders of outstanding bonds who do not agree to take eighty cents on the dollar of the face value thereof, and when the amount owing is so judicially determined and adjudged by the Court, the debtor will retain its property subject to said amount so fixed by the Court to be owing and same shall stand secured by the trust deed on the property. The plan says that "if the holders (of the bonds) are not willing to take this amount (eighty percent) as herein proposed, in that event, the debtor herein proposes to take its property subject to their liens to secure whatever amount the Court determines due them." The reason for the insertion of the offer to pay eighty cents on the face value of the bonds, or have the Court judicially determine the amount owing, was that the validity of said bonds was challenged in the equity case, and which had not been determined by the Court. All plans of reorganization provide for substantial benefits to unsecured creditors and preferred stockholders, thereby fully protecting the rights of all persons interested in debtor or its assets. This proposition contemplated a reasonable extension of the date of payment of said bonds and suggested the original date of maturity thereof fixed by the deed of trust, but provided that default for ninety days in payment of interest should mature the bonds. Debtor submitted to the Court its proposition to give a good and sufficient guaranty to the satisfaction of the Court of its ability to carry out its plans of reorganization. The trial Judge was entirely satisfied with the proposed guaranty of debtor, and held that the plans of debtor were filed in good faith.

Debtor prayed and was granted a direct appeal from the District Court to the Circuit Court of Appeals at Cincinnati and also filed its petition under Section 24-B of the Bankruptcy Act for leave to appeal, which was granted by said Circuit Court of Appeals. The case was advanced on the docket and orally argued on January 7, 1936, and an opinion was handed down on February 13, 1936. The United States Circuit Court of Appeals held that:

(1) The Court holds sub-section (b) (5) of Section 77-B of the Bankruptcy Act unconstitutional and invalid.

(2) That the Court confessed its inability to understand

debtor's proposed plan of reorganization, but held that it was not presented in good faith.

Petitioner is advised and verily believes and avers that in the judgment and opinion of said Circuit Court there is manifest error to the prejudice of the rights of debtor, upon both propositions above stated. That is to say, petitioner avers that said provision set out in sub-section (b)(5) of Section 77-B of the Bankruptcy Act is constitutional and valid, and that the petition and plans of reorganization of debtor were filed in good faith.

Petitioner therefore prays that it be permitted to file this petition in this Honorable Court, that the writ of certiorari be granted to the end that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be corrected and reversed and that justice may be done in the premises.

Petitioner herewith presents its specifications or assignments of error, together with brief in support thereof, and makes same a part hereof.

E. W. CARMACK, JR.

Subscribed and sworn to before me on April 24, 1936.

(SEAL)

MAYVER MOORE,
Notary Public.

ASSIGNMENT OF ERRORS

I

The Honorable Circuit Court of Appeals erred in holding that sub-section (b) (5) of section 77-B of the Bankruptcy Act is unconstitutional and invalid. Said sub-section (b)(5) of Section 77-B is constitutional and valid.

II

Said Court erred in holding that the petition for reorganization was not filed in good faith.

III

Under said statute the trial judge is clothed with discretion

to ascertain and determine when a petition for reorganization is filed in good faith. The District Judge found as a fact and adjudged that this petition was filed in good faith. The Circuit Court of Appeals did not find that the District Judge had abused his discretion, and, therefore, was in error in holding that the petition was not filed in good faith.

IV

There is nothing in the record to support the finding of bad faith on the part of debtor.

V

The last alternative plan filed by debtor on Otcober 23, 1935, did not require action under sub-section (b)(5); and, even if same be held invalid, said plan should have been approved, regardless of sub-section (b)(5).

Wherefore, the Circuit Court of Appeals erred in refusing to remand the case to the District Court for action thereon and approval thereof.

BRIEF AND ARGUMENT

Opinion of District Court delivered October 15, 1935, (Record 111). Opinion of District Court delivered October 23, 1935, (Record 121). Opinion United States Circuit Court of Appeals, Sixth Circuit, 81 Fed., (2d) 463. Said opinion, this record, p.——.

Jurisdiction of this Court is claimed under Section 347, Judicial Code. Sec. 240., as amended. The judgment was rendered in the United States Circuit Court of Appeals for the Sixth Circuit on February 13, 1936. Record ———. That Court held that sub-section (b) (5) of Section 77-B of the Bankruptcy Act, as amended, (11 U.S.C.A. Sec. 208) is un-

constitutional and void, as violative of the due process clause of the Federal Constitution. 81 Fed. (2d) 468.

The Court sustained the contention of some of the bondholders that the reorganization plan amounted to taking of the property of the bondholders without due process, in violation of the Fifth Amendment to the Constitution of the United States. 81 Fed. (2d) 466. Said Court held that the petition and plan of reorganization were not filed in good faith. That Court held that the plan of reorganization fails to meet the statutory test of good faith, and that, since the trial Court held that since debtor had received the approval of the District Court upon the good faith of its latest plan, that there is no legal impediment to submission by the debtor of an entirely new plan of reorganization not heretofore considered and adjudicated, thus making it necessary to pass upon the validity of sub-section (b)(5) of Section 77-B of the Bankruptcy Act. 81 Fed. (2d) 467. The term "good faith" is treated as synoymous with feasibility.

STATEMENT OF THE CASE

Tennessee Publishing Company, debtor, is a Tennessee corporation, which publishes morning and evening daily newspapers in Nashville, Tennessee. It filed its petition under the authority of Section 77-B of the Bankruptcy Act in the United States District Court for the Middle District of Tennessee on June 6, 1935. (Record 2). This petition averred the necessary jurisdictional facts, among other things, that it was unable to meet its debts as they mature and that it required leave under Section 77-B of the Bankruptcy Act; that its assets were in the hands of a Receiver appointed by said District Court under an equity proceeding brought on March 3,

1933, which receivership is still pending. An order was entered by the District Court on June 6, 1935, reciting that the petition had been filed in good faith, and that it was approved as properly filed under Section 77-B of the Bankruptcy Act. The business and assets of debtor corporation were ordered to remain in the hands of the Receiver in the equity cause. A rule was made that all parties to said receivership case, and all creditors and stockholders in debtor corporation should appear and show cause, if any, as to whether or not said petition of debtor should be dismissed at a hearing therein set for July 6, 1935. (Record 1). An order of continuance was entered, and the case was heard on July 13, 1935, (Record 13), at which time debtor filed its plan of reorganization providing that

(a) The value of all the securities, towit: the bonds issued by debtor, be ascertained and judicially determined by the Court in this proceeding.

(b) That the value of all the assets of debtor be ascertained and judicially determined by the Court in this proceeding.

(c) That the costs of the receivership case be ascertained.

This plan proposed that ten year first mortgage bonds be issued in an amount amply sufficient to cover the value of all its properties to be judicially determined, to be set out in the plan.

On October 15, 1935, debtor filed its amended plan of reorganization, which provides as follows:

"(1) The Debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation, as the same may judicially be determined by this Court or the appraised actual cash value of all valid interests, claims or liens on any of Debtor's property when judicially determined., Said payments to be made into Court or under such other arrangement as the Court may hereafter direct.

Or if the Court so direct:

(2) The Debtor offers to pay in cash under the conditions and terms set out in paragraph (1) above, the appraised value of the property as judicially determined by this Court, covered in the recent appraisal of the American Appraisal Company and described therein as "Property covered by the mortgage and/or deed of trust," and to leave for liquidation in any manner deemed suitable by the Court the remaining property of the Tennessee Publishing Company.

(3) This amendment to the plan of reorganization heretofore filed in this cause shall, if the Court so order, supersede

and supplant all provisions in any plans of reorganization heretofore submitted by the Debtor, insofar as said plans of reorganization may be in conflict herewith, but no further or otherwise."

Record 86.

American Appraisal Company had theretofore been appointed by the Court to appraise the properties of debtor and had filed its complete detailed appraisal showing that the properties claimed by the bondholders to be covered by the trust deed executed to secure the bonds in the principal sum of $750,000.00, bearing date of November 1, 1928, had a value of about $295,000.00, and that the property of debtor not so covered was worth much less than that sum. This appraisal in a separate volume was sent up in its original form to the United States Circuit Court of Appeals. (Record 132).

On said date, October 15, 1935, the District Judge delivered his oral opinion, with respect to the plans of reorganization which had been filed up to that date. Debtor had submitted to the Court evidences of its ability to carry out its plans of reorganization. The Court stated that he found as a fact that the petition was filed in good faith. The Court said:

"So, I find as a fact that the application is not only not in bad faith, but it is in good faith.

It is said in the motion to dismiss that the plan is not capable of execution, and that the proponents of the plan are unable to perform the covenants and agreements set out therein. As to that I do not know, I do know that they say they have capital behind them; that they can make good every proposal offered in the plan, and that they have sufficient financial backing. In the second plan it is proposed to give security that they will comply with this provision, if accepted. They also propose, if the lien holders are unwilling to accept new security, for their debts, they will pay in cash, the value of the property covered by the mortgage, the value to be judicially determined by the Court. I have no reason to doubt that they can do just what they say they can do. Of course, if they should fail to do so, it would result that the plan would fail, and another plan would be offered, or else the estate would be liquidated in another way. I certainly would not be justified at this time, in finding that they are not financially able to carry out the proposals of the plan."

Record 116.

The Court further said, with respect to the non-assenting unsecured creditors:

"For some reason (unknown to the Court) a great majority of the unsecured creditors are unwilling to accept that

stock. Out of say $300,000.00 of unsecured creditors as reported by the standing Master, only about $11,000.00 come into court and agree to accept the proposition. It is hard to understand why that is so, it looks to me that if I were an unsecured creditor, I would choose preferred stock in any amount in a new corporation, to nothing. It savors of a collusion which doesn't look good. Just why an unsecured creditor would rather have nothing, than to have preferred stock in a new corporation is hard to understand.

I refer to these things to emphasize the fact that the petition, in my judgment, is filed in good faith."

Record 117.

The Court then referred to the law as set out in Section 77-B of the Bankruptcy Act. (Record 117). He then referred to the case of **Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, stating that the adoption of the plan over the protest of practically all the unsecured creditors and of more than two-thirds of the bondholders would deprive them of their property without due process of law in violation of the Fifth Amendment of the Federal Constitution. (Record 120).

Thereupon, on Oct. 23, 1935, debtor filed its third plan of reorganization. (Record 93). Under this plan it proposed:

(1) To take over the operation of its affairs, taking the property subject to all legal liens, to the full amount that the Court determines due the holders thereof, this applying to all property of debtor included in the mortgage to secure the bond issue. If the holders of the securities so secured by mortgage are willing to accept eighty cents on the dollar of the face value of the bonds so held by them, making a total of $600,000.00 outstanding against debtor and certain of its property, debtor is willing to accept this amount as due and retain its property subject to its mortgage for that amount, the Court to fix a reasonable rate of interest for debtor to pay on said $600,000.00 in the hands of the secured creditors until same is matured and paid. Debtor proposes to agree upon a value of eighty cents on the dollar as to all bonds held by assenting bondholders, same to be secured by the existing mortgage, and to have the Court determine the amount due other dissenting holders of bonds who may be unwilling to take eighty cents on the dollar, and when the same is so judicially fixed by the Court in each individual case of the holders, the debtor will retain its property subject to said amount so fixed by the

Court to be due and secured by the mortgage on its said property.

(2) That the properties and assets of debtor not included in the mortgage, debtor proposes to take in addition to that covered by the mortgage, and will pay into Court the sum of $40,000.00 in cash therefor.

(3) Debtor proposes further to protect the holders of the bonds secured by the lien by paying to them, after the amount of interest is fixed by the Court as above provided, the interest in advance for a period of three months, and to guarantee to the Court and to the bondholders that this interest will be paid, the sum of $10,000.00 to take care of the interest for the first three months on said bonds, will be immediately paid into Court to be used in paying interest for the first three months, and that it is part of the plan that any time debtor does not pay the interest on said bonds in advance for a period of ninety days, that the whole of said outstanding issue shall become due and collectible and be foreclosed under the terms of the mortgage, that as soon as it is definitely determined how much will be paid the unsecured creditors from the proceeds of the sale of the proposed bond issue as above set out, debtor will issue class A preferred stock in sufficient amounts at the par value of $10.00 per share, to make up the deficit, if any shall exist between the total amount paid or to be paid the unsecured creditors, and the sum of $100,000.00 to be divided ratably among such unsecured creditors. This preferred stock shall bear fixed dividends of six percent per annum.

(4) As soon as it shall be definitely determined how much will be paid the preferred stockholders from the proceeds of the sale of the proposed bond issue, under its former plan, debtor will issue Class B preferred stock in sufficient amount to make up the deficit, if any shall exist, between the total amount paid, or to be paid, the preferred stockholders and the sum of $25,000.00, to be divided ratably among them, this Class B stock to bear a fixed dividend of five percent.

The outstanding bond issue in the hands of these contesting bondholders, or at least some of them, had been attacked by petitions filed by some of the creditors in the receivership cause, and the validity of these bonds had not been determined by the Court, and have not yet been determined by the Court in the equity cause, although the standing Master had reported, though prior to the filing of the pleading attacking same,

that said bonds are valid. This report of the standing Master has never been confirmed by order of the Court.

On the filing of this last plan the District Court delivered an oral opinion which appears on page 121 of the printed record. In the course of the opinion the Court said:

> "If two-thirds of the secured creditors should agree to the plan, it would not deprive the minority of a property right for the Court to approve same. But, if none of the secured creditors are willing to accept the plan, and the Court should, notwithstanding, approve it, it would be depriving them of substantive rights in property, and would, therefore, be violative of the Fifth Amendment. I can see no alternative except to dismiss the petition, and let the property be sold in the equity case."
>
> (Printed record 123)

A final order dismissing the petition and the plans of reorganization was entered on October 25, 1935, adjudging that

> "Said petition and the plans presented therein and thereby should be dismissed, except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinions of the Court," etc.
>
> (Printed record, 124)

The case was properly appealed by debtor both by petition to superintend and revise under Section 24-B and also by direct appeal from the District Court under Section 24-A of the Bankruptcy Act.

As heretofore shown, the United States Circuit Court of Appeals held sub-section (b) (5) of Section 77-B of the Bankruptcy Act unconstitutional and invalid. That Court also held that the plans of reorganization submitted by debtor were not workable and consequently not presented in good faith in the sense of the law. On this question the decision was not unanimous, Judge Allen dissenting.

PROPOSITIONS OF LAW

"Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter, which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

Norman v. B. & O. R. R. Co., 294 U. S. 240; 79 L. Ed. 885.

"Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty and property. Bankrupt laws, whatever may be the form they assume, are of that character."

Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527; 27 L. Ed. 1024.

"As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority."

(Knox v. Lee and Parker v. Davis (Legal Tender Cases) 79 U. S. 457; 20 L. Ed. 312.)

Every bondholder of debtor acquired his bonds with the knowledge of the possible exercise by Congress of its constitutional power to enact uniform bankruptcy laws affecting his contract rights and subject to the "congenital infirmity."

It is settled law that a bankruptcy court has the power to sell property encumbered by liens or mortgages, regardless of the power of sale contained in deeds of trust and to transfer the lien from the property to the proceeds of the sale.

Van Huffel v. Harkelrode, 284 U. S. 227; International Shoe Company v. Pinkus, 278 U. S. 261; Isaacs v. Hobbs Tie & Timber Co., 82 U. S. 734.

The provision of Section 77-B here involved, sub-section (b) (5), does not differ in principle from the above legal proposition. It provides that the Court shall judically determine

the value of the property on which the lien exists and substitute that value for the property. This means that the Court may judicially determine the public-sale value of the property, as the equivalent of the proceeds arising from a public sale, and this sub-section does not, therefore, violate the due process clause of the Fifth Amendment because the mortgagee gets the full value of his property.

Assuming that the due process clause of the Fifth Amendment operates as a limitation upon the exercise of Congressional power under other sections of the Constitution, such as bankruptcy, interstate commerce, eminent domain, etc., this limitation is not more restrictive as against the exercise of legislative power of Congress under the one section of the Constitution than under any other section. The power of Congress to enact uniform bankruptcy laws is paramount and unrestrained except by the limitations upon its authority by the Fifth Amendment of the Constitution, which forbids the taking of private property for public use without just compensation or due process of law,

> "Has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing on or to inhibit laws that indirectly work harm and loss to individuals."

L. & N. Ry. Co. v. Mottley, 219 U. S. 481; 55 L. Ed. 303. Legal Tender cases, 12 Wall., 550; 20 L. Ed. 311. Gibbons v. Ogden, 9 Wheat. 1; 6 L. Ed. 23.

Scranton v. Wheeler, 179 U. S. 162; 45 L. Ed. 137.

Union Bridge Company v. United States, 204 U. S. 364; 51 L. Ed. 523.

Addyston Pipe & Steel Company v. United States, 175 U. S. 211; 44 L. Ed. 136.

One of the strongest and best considered cases that has come under our observation on the point herein is that of Campbell v. Allegheny Corporation, 75 Fed. (2d) 947. Judge Parker delivering the opinion of the Court, said:

> "Little need be said as to the question which arises under the Fifth Amendment. There is no question of course, but that the exercise of the bankruptcy power by Congress, as is the case with other delegated powers, is subject to the requirement of due process contained in that Amendment. Monongahela Nav. Co. v. United States

148 U. S. 312, 336, 13 S. Ct. 622, 37 L. Ed. 463; Hanover Nat. Bank v. Moyses, supra, 186 U. S. 181, 192, 22 S. Ct. 857, 862, 45 L. Ed. 1113. But as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not to be taken as in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law.'"

"The fact that secured debts are affected by the Act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt. **** And the constitution expressly permits and grants to Congress the exercise of the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to 'subject of bankruptcies.'

"As a matter of fact, no property in any real sense is taken from the dissenting creditor when he is compelled under Section 77-B to scale his claim and accept securities in lieu thereof. The securities held by him have already shrunk in value before the proceeding under the act is instituted; and all that is required of him is that he face reality and accept his pro rata interest in the debtor's property in a form which will not jeopardize the rights of other creditors similarly situated."

(Campbell v. Allegheny Corporation, 75 Fed. (2d.) 954.

There is no deprivation of property in any real sense when secured creditors are compelled by law, such as Section 77-B, to accept, in place of their contract rights against the bankrupt estate, something which the Court finds, under the circumstances, to be the equivalent.

Canada Southern R. Co. v. Gebhardt, 109 U. S. 527; 27 L. Ed. 1020.

Assuming, however, that such deprivation is involved, it must be remembered that it is the essence of bankruptcy legislation to cut down the rights of individual creditors in order to insure to all an equitable portion of the debtor's assets. In re Vogler, Fed. Cas. No. 16986, at 1250. The secured creditor has no greater right to the protection of the Fifth Amendment

as against an exercise of the bankruptcy Act than the unsecured creditor.

In re Sterba, 74 Fed. (2d) 413.

In re Burgh, 7 Fed. Supp. 184.

Campbell v. Allegheny Corp. 75 Fed. (2d) 947.

Gerdes on Corporate Reorganizations, vol. 1. p. 101.

Section 77-B of the Bankruptcy Act is a bankruptcy statute and is a "law on the subject of bankruptcy." This Act contains the fundamental element of bankruptcy. It relieves the debtor of its obligations. It provides for the distribution of its property to its creditors.

Section 77- of the Bankruptcy Act, which applies alone to interstate railroads, and which, in all its essential provisions, is substantially the same as Section 77-B, which applies to other corporations, including Tennessee Publishing Company, was held by this Court to be constitutional.

Continental Illinois Bank & Trust Co. v. Chicago Rock Island Railway Co., 294 U. S. 648. 79 L. Ed. 1110.

In most of the cases decided in the lower Federal Courts under Section 77-B, the Act has been assumed to be constitutional, without objection. In the few cases in which the question has been directly considered and passed upon, the Courts have held it constitutional.

In Re: Central Funding Corp., 75 Fed. (2d) 256; Campbell v. Allegheny Corp., 75 Fed. (2d) 947; Vitagraph v. St. Louis Properties Corp., 77 Fed. (2d) 590;

Re: New Rochelle Coal & Lbr. Co., 77 Fed. (2d) 881. Grand Blvd., Invest. Co. v. Strauss, reported in C. H. New Matters Division, Sec. 3537;

Re: Pierce-Arrow Sales Corp., 10 Fed. Supp. 776; Re: Hotel Gibson Co., 11 F. Supp. 30. Re: Consolidated Coal Co., reported in C. C. H. New Matters Division, Sec. 3538.

We quote the following from Section 77 of the Bankruptcy Act, (e) viz:

"If the judge shall approve the plan, he shall file an opinion, stating his conclusions, and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commis-

sion to the creditors of each class, whose claims have been filed and allowed in accordance with the requirements of sub-section (c) hereof, and to the stockholders of each class and/or to the committees or other representatives thereof for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: **Provided,** That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interest of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: **Provided further,** that submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors had no value, **or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests."** (Black type ours.)

We quote the following from Section 77-B, sub-section (b):

"(b) The plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities of any character or otherwise; (3) shall provide for the payment in cash of all costs of administration and other allowances made by the Court, except that compensation or reimbursement provided for in subdivision (c) clause (9), of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment and the court finds such compensation reasonable; (4) shall pro-

vide in respect of each class of stockholders of which less than a majority shall accept such plan (unless the judge shall determine either that the debtor is insolvent, or that the interest of such class of stockholders will not be affected adversely by the plan), adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan, (a) by a sale of the property at not less than a fair upset price, or (b) by appraisal and payment in cash of the value either of their stock or at the objecting stockholders' election, of the securities allotted to such stockholders under the plan, if any shall be so allotted, or (c) by such methods as will do substantial justice to such stockholders under and consistent with the circumstances of the particular case; (5) **shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan** (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide **adequate protection for the realization by them of the value of their interest,** claims, or liens, if the property affected by such interests, claims, or liens is dealt with by the plans, either as provided in the plan (a) by the transfer or sale of such property subject to such interest, claims, or liens, or **by the retention of such property by the debtor subject to such interest, claims, or liens,** or (b) by a sale free of such interest, claims, or liens at not less than a fair upset price and the transfer of such interest, claims or liens, to the proceeds of such sale; or (c) **by appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interest, claims, or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection."** (Black type ours).

It will be observed that, on the point here directly in issue, the same provision is contained in both section 77 and section 77-B.

The Honorable United States Circuit Court of Appeals erred in holding that the case of **Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, is controlling in the determination of the case at bar, for the following reasons:

(1) The Frazier-Lemke Act under consideration by this

Court in the case cited is not, in fact, a bankruptcy statute, because

(a) It makes no provision for the release of the obligations of the farmer debtor, which is essential in a bankruptcy statute;

(b) It makes no provision for the distribution of the assets or estate of the farmer debtor among his creditors;

(c) It arbitrarily and capriciously, and without just compensation to the creditor, allows the farmer debtor to retain the mortgaged property for an unreasonable length of time at a rate of interest so low as to amount to the taking of the creditor's property without due process of law.

(d) The opinion of this Court in this case states that the Court has "no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific properties."
295 U. S. 589

(2) Section 77-B is, in fact, a bankruptcy statute. It provides,

(a) For the protection of all the various classes of creditors of the corporation;

(b) It provides for the release of the corporation debtor's obligations;

(c) It provides that, as to secured creditors, they must be paid in full, or shall be paid either in cash the "value either of such interest, claims or liens, or at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted, or by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection."

The mere change of form of the secured creditors' property, or property rights, so long as the value thereof remains, does not violate the constitutional rights of the creditor. This is fittingly illustrative in the exercise of the power of eminent domain.

GOOD FAITH

The Good Faith Requirement of 77-B Is Met If The Petition Is Filed With An Honest Desire To Save The Company From Liquidation And To Keep It As A Going Concern.

In re: Prairie Avenue Building Corp., U. S. Dist. Ct., Eastern Dist. of Ill., decided June 19, 1935, 11 Fed. Supp. 125.

In re: Associated Gas & Electric Co. (Judge Mack) U. S. Dist. Ct. S. D. N. Y., October 26, 1934.

In re: Cheney Bros., U. S. Dist., Ct. of Conn., October 29, 1935.

In re: Surf Building Corp. U. S. Dist. Ct. E. D., Ill., October 17, 1934, 11 Fed. Supp. 295.

In re: South Coast Co., U. S. Dist. Ct. of Del. September 12, 1934, 8 Fed. Supp. 43.

An examination of the cases which hold that the good faith requirement of 77-B is not met because no feasible plan is presented, can be readily reconciled with the above authorities, because upon examination it appears that in none of those cases requiring the presentation of a feasible plan was it possible for the petitioning creditors or the debtor to present such a plan, and the facts so show. The true rule is that if it is manifestly impossible to perfect a plan of reorganization, then the petition could not be filed with an "honest desire" in the legal sense.

To hold that no petition under 77-B is filed in good faith when no plan of reorganization is adopted under and pursuant to said petition, would necessarily entail setting aside all petitions filed where successful reorganizations were not consummated, on the ground that the same were not filed in good faith. The statute (Sec. 77-B of the Bankruptcy Act) specifically provides a method for dismissing the petition for reorganization when no plan can be worked out thereunder.

Section b-8 of the Act provides for action by the Court, as follows:

> "If a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and acceptance is not confirmed, may, after hearing, whether proceedings be voluntary or involuntary, either extend such period or dismiss the proceedings under this section, or, except in the case of a railroad or other public utility, or of a debtor which has not

been found by the judge to be insolvent, direct the estate to be liquidated, or direct the trustee or trustees to liquidate the estate, appointing a trustee or trustees if none shall previously have been appointed, as the interests of the creditors and stockholders may equitably require."

From the above it will be seen that even if no plan of reorganization whatsoever is proposed, it is not required that the court shall dismiss the petition, but, on the other hand, the court is specifically authorized to "direct the estate to be liquidated."

In view of the above provision of the Act itself, we respectfully submit that the proposal of any plan of reorganization either before or after the filing of the petition cannot be held an essential element of the good faith provision.

We assume that the honest desire to save the company from liquidation and to keep it as a going concern requires that it must not be manifestly impossible for a reorganization to be effected. Applying this test of good faith to the instant case, it is obvious that the Tennessee Publishing Company as a corporation, having obtained new sources of capital, at least to the amount necessary to pay in cash the entire value of its property as the same might be determined by the court, could reasonably anticipate working out a successful reorganization plan.

All of the decisions hold that it is not necessary that the reorganization plan be formulated and approved before the filing of the petition, or even approved before the submission of such a plan for approval by the court. The debtor, Tennessee Publishing Company, could reasonably hope that in view of the new capital resources it had available, it could induce its creditors to accept some mutually satisfactory plan of reorganization. We respectfully submit that the record indicates that the reason it was not able to work out a plan of reorganization with the consent of its creditors is not because of financial considerations but because of the other considerations incident to and connected with the type of business in which debtor is engaged. Furthermore, debtor was reasonably justified in thinking that it could work out a reorganization, even without the consent of the proper majority of its creditors, in view of the plain provisions of section b-5 of Section 77-B of the Bankruptcy Act, the constitutionality of which section had not up to that time been questioned. Surely if the Congress of the United States could pass such an Act, deeming it constitutional, containing such a section, the debtor corporation, Tennessee Publishing Company, could

reasonably rely on the constitutionality of such a section until the same be held unconstitutional.

To hold that this debtor, Tennessee Publishing Company, was not guided by an honest desire to save the company from liquidation and keep it as a going concern when it filed its petition, because the surrounding facts and circumstances showed that it was manifestly impossible to reorganize the debtor, is entirely unjustified from this record. The debtor had attracted to itself sufficient new capital to reasonably anticipate the co-operation of its creditors in reorganization, and failing this it had attracted sufficient new capital to proceed to reorganize without the concurrence of the requisite number of its creditors by paying in cash the appraised value of the interests, claims or liens of such creditors, as provided in section b-5 of 77-B of the Bankruptcy Act.

Under these circumstances the normal thing to expect was a successful reorganization, and it is the unexpected which has happened, namely the failure to get the concurrence of its creditors and the action of the court holding unconstitutional section b-5 of 77-B of the Bankruptcy Act.

Section c-1 of Section 77-B of the Bankruptcy Act, provides for the appearance of three creditors in order to have the proceedings dismissed. This evidently is the section under which the creditors sought to have this petition to the debtor dismissed as not filed in good faith. A discussion of this procedure appears in an opinion by Thomas, District Judge, in a decision, In re: Chaney Bros., U. S. Dist. Ct. of Conn., October 29, 1935. The court there analyzes, and we believe correctly analyzes, the procedure as provided under Section 77-B. The dismissal of the petition in that case was asked on the ground that it was not filed in good faith. The court quotes 77-B, section c-1, as follows:

> "Appear and controvert the facts alleged in the petition or answer, the judge shall determine as soon as may be the issues presented by the pleadings, without the intervention of a jury, and unless the material allegations of the petition or answer are sustained by the proofs, the proceedings shall be dismissed."

and holds that the hearing herein provided for is limited to a traverse of the allegations, jurisdictional or otherwise, contained in the petition.

It will be noted that the Tennessee Publishing Company, debtor, fully sustained each and every one of the allegations contained in its petition of reorganization. It is well established that the petition for reorganization need not contain

any statement that a proposed plan of reorganization has been prepared or approved, and the analysis by Judge Thomas in re Chaney Bros., **supra.,** strengthens the belief that Congress did not intend, in its wording of 77-B, to provide that the good faith requirement should necessitate the presentation of any successful plan of reorganization, or any plan of reorganization, in the matter.

In summary, we submit that Section 77B of the Bankruptcy Act, taken as a whole, shows that the good faith requirement for the filing of the petition does not require that thereafter a feasible plan of reorganization be submitted, and point to the following as sustaining this interpretation.

(a) The petition for reorganization does not have to state that any plan of reorganization has been prepared, or that it can be successfully consummated, or that approvals have been obtained by the requisite number of creditors;

(b) The provision for the appearance of creditors in objection to the filing of the petition under Section 77-B limits the issues at the hearing to a determination of the material allegations of the petition. Section c-1 of 77-B of the Bankruptcy Act—In re Chaney Bros., **supra.;**

(c) The act provides that the debtor can submit a proposed plan of reorganization without the approval of any of the creditors and ask that the court approve the same in advance of submission to the creditors.

(d) Section b-8 of the Act provides that if no plan of reorganization is ever submitted, the court can, in its discretion proceed under 77-B, and liquidate the assets of the corporation.

It further appears that it would be an unusual, cumbersome and unnatural procedure for the court to be called upon to determine good faith in the filing of the petition at the time of the presentment of the same, and thereafter determine from the course of subsequent events whether or not that judicial determination made at the time of the filing of the petition was correct, and whether or not that judicial determination should stand.

Furthermore, the only logical and proper way to dismiss a petition because it was not filed in good faith, would be to set aside the order permitting its filing, which would in effect make the proceedings void **ab initio,** and raise grave doubts as to the legal effects of various actions taken under said proceedings before said order was set aside. Section 77-B has

ample provisions of dismissal of the petition without relating such dismissal back to the filing of the petition, and there is no reason to put such a strained and forced construction upon the Act.

An appeal from the order of the United States District Court permitting the filing of the petition under 77-B could only be taken by leave of the Appellate Court as provided in 24-b of the Bankruptcy Act. No such leave to appeal having been sought or obtained by the objecting creditor from the order of the District Court approving the filing of the petition, the Circuit Court of Appeals for the Sixth Circuit was without jurisdiction to set aside the order of the United States District Court holding that the petition was filed in good faith, and is without jurisdiction to hold that the petition of the Tennessee Publishing Company, Debtor, was not filed in good faith.

The Supreme Court of the United States has recently had occasion to hold that an appeal from an order dismissing or refusing to dismiss a petition under 77-B, lies only in the discretion of the appellate court.

> Meyer v. Kenmore Granville Hotel Co., U. S. Sup. Ct., February 3, 1936.
>
> Citing Campbell v. Alleghany Corp., 75 Fed. (2d) 947.
>
> See also St. Louis Can Co. v. General American Life Ins. Co., decided by 8th C. C. A., April 15, 1935, 77 Fed. (2d) 598.

The Tennessee Publishing Company, Debtor, filed its petition for reorganization under Section 77-B of the Bankruptcy Act on the 6th day of June, 1935. On that same date an order of court was entered sustaining the petition as filed in good faith. That order has never been set aside or vacated, and the district court specifically refused to set aside that order and hold that the petition was not filed in good faith.

One of the objecting bondholders sought and obtained from the District Court an appeal from the order of the District Court sustaining the petition as filed in good faith, but did not obtain leave of the Court of Appeals as provided in section 24-b of the Bankruptcy Act. Hence, the Circuit Court of Appeals was without jurisdiction to entertain this appeal. See Mayer v. Kenmore Granville Hotel Co., **supra.,** and properly dismissed the same.

The District Court dismissed the petition of Tennessee Publishing Company, Debtor, which dismissal had to be by the

terms of the Act under section b-8 of Section 77B of the Bankruptcy Act. Leave to appeal from this action of the United States District Court was obtained from the Circuit Court of Appeals, and the instant case is an outgrowth of said appeal. The Circuit Court of Appeals assumed that because the debtor corporation had made an appeal under section 24-b of the Bankruptcy Act from the order of the United States District Court dismissing the petition of debtor as provided in section b-8 of the Act, that it, the United States District Court of Appeals, had full jurisdiction to pass on and determine the correctness of the action of the United States District Court holding the petition filed in good faith.

We respectfully submit that the appeal of the debtor corporation is limited and that the entry of the order sustaining the petition as filed in good faith, and the refusal of the judge to set aside said order, is an entirely distinct and different action of the court from the dismissal of the petition under section b-8 of 77-B of the Bankruptcy Act. The court was acting under two different sections of the Bankruptcy Act. The rules and statutory provisions governing its actions in the two matters were entirely distinct, and the legal consequences which flow from its actions on the two matters were entirely distinct. An appeal from the court's action in one matter did not bring up for review its action in the other matter.

We respectfully submit that the Court of Appeals had no jurisdiction to inquire into or pass on the order of the United States District Court entered June 6, 1935, sustaining the petition as filed in good faith, or to review the exercise of discretion by the District Court in entering said order.

Furthermore, if the Circuit Court of Appeals had jurisdiction its action in holding the petition was not filed in good faith because no feasible plan was presented is totally unjustified by the record, and on the contrary it plainly appears that debtor with extreme diligence presented a thoroughly feasible plan of reorganization wherein and whereby debtor offered to pay in **cash** the entire value of the interests, claims, or liens of the creditors **as the same might be determined by the Court.** (R. 86—Filed October 15, 1935).

Again, eight days thereafter, on October 23, (R. 92) the debtor in order to meet the doubts expressed by the Court as to the constitutionality of its plan proposed an alternate plan offering the secured creditors eighty percent on the debts, or that said secured creditors be permitted to retain the lien on the property for the full amount now owed said secured creditors, asking only such reasonable time as the

Court might fix in order to pay said secured creditors in full whatever amount debtor corporation might owe them, with proper guaranties of ability to make said payment. Surely this last plan is clearly within constitutional limits as recently determined by this Court.

> Home Building & Loan Association v. Blaisdell 290 U. S. 398-483, 78 L. Ed. 413.

The judge of the District Court did not feel that the plans proposed were without merit, but based his decision solely on constitutional restrictions. (Oral opinion delivered by the Court October 15, 1935, R. 111)

The Circuit Court of Appeals at Cincinnati refers to debtor, "whose sole hope of financial salvation is an abiding faith in miracles." We respectfully submit that in spite of this opinion by the Court of Appeals a reliance by debtor on the constitutionality of an Act passed by the Congress of the United States is not an abiding faith in miracles and that the plans of reorganization proposed by the debtor were feasible and that the United States District Court was entirely correct in holding that the petition of debtor Tennessee Publishing Company was filed in good faith.

CONCLUSION

If the bonds in the principal sum of $750,000.00, on which there is now interest past due amounting to about $150,000.00, making a total of $900,000.00, are valid, this debtor is insolvent. The property covered by the mortgage executed to secure the bonds has been appraised by American Appraisal Company under appointment of the Court at $295,000.00. Its

unsecured debts amount to about $300,000.00 and its property not covered by the mortgage is worth much less than that sum.

A petition is pending in the equity cause of C. O. Carpenter, Receiver, v. Tennessee Publishing Company, filed by unsecured creditors attacking the validity of the bonds, and also questioning the amount due thereon, if held valid. This proceeding is undetermined. The proposition of purchase by Mr. Paul Davis is made subject to the terms and conditions in the deed of trust made by debtor to secure said bonds, with the right to make settlement of the purchase price by applying toward the payment thereof any outstanding bonds and maturing and unpaid interest coupons to the amounts to which such bonds and interest coupons would be entitled from a distribution among the holders of the bonds of the net proceeds of such sales after making the proper deductions for the costs and expenses of the sale. For the mortgaged property he offers to pay $400,000.00 in the manner stated. For the remainder of the unmortgaged property he offers to pay $40,000.00 in cash.

Debtors amended plan of reorganization filed October 15, 1935, "offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation, as the same may judicially be determined by this Court, or the appraised actual cash value of all valid interests, claims, or liens on any of debtor's property when judicially determined. Said payment to be made into court or under such other arrangement as the Court may hereafter direct. Or the debtor offers to pay in cash under the conditions and terms set out above, the appraised value of the property as judicially determined by this Court, covered in the last appraisal of the American Appraisal Company, and described therein as "property covered by the mortgage and/or deed of trust," and to leave for liquidation in any manner termed suitable by the Court the remaining property of the Tennessee Publishing Company."

This amended plan complied with the provision of Section 77-B of the Bankruptcy Act, and was by the Court held to be proposed in good faith, but the trial Court ruled that the written consent of two-thirds of each class of creditors is a prerequisite to the acceptance and affirmance of the plan by the Court.

The Circuit Court of Appeals held that the entire provision, sub-section (b) (5) of Section 77-B is unconstitutional and

void, and that the consent of all the secured creditors is requisite to the confirmation of the plan by the Court.

Since the trial Court was of opinion that the consent of two-thirds of each class of creditors was necessary, debtor prepared and filed its third plan on October 23, 1935. (Record 93.) That plan provided that debtor would take over all its property and treat all the outstanding bonds as valid, and scale the bonded debt to eighty cents on the dollar of the principal sum, thus reducing the bonded debt to $600,000.00, which is twice the amount of the appraised value of the mortgaged property under the appraisal of the American Appraisal Company.

It is insisted on behalf of debtor that this proposition is workable, feasible, and hence in good faith.

This property is valuable as a going concern. Like a railroad, it cannot be sold or dealt with in piece-meal. Debtor proposes, under its third plan, to pay the interest three months in advance in cash, and to deliver to the Court $10,000.00 in cash for the first three months interest on the bonds. The interest on $600,000.00 bonds at 6% per annum would be $36,000.00, or $3,000.00 per month, and its offer was to pay this amount in cash into Court at once to be used for the payment of interest for the first three months after the adoption of the reorganization plan. It is also proposed that if debtor does not pay the interest on said bonds in advance for a period of ninety days that the whole of said outstanding issue shall mature and that the trust deed may be foreclosed under its terms. (Record 95). Debtor insists that this is an entirely fair and equitable protection of the property rights of the secured creditors and does not violate any of their constitutional rights.

E. W. Carmack, Jr., owner of the common stock of debtor, is an experienced and successful newspaper man, as is shown by the opinion of the District Court. (Record 114-115).

Respectfully submitted,

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